Supreme Court, U.S.
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No. 00-_____

IN THE

Supreme Court of the United States

ERIC BUCKLEY; DAVID W. MOWRY; DALE C. RATHFON, JR.; DAVID A. REICHENBACH; DENNIS L. REICHENBACH; JACOB WEAVER; DUANE L. WHITE; AND SANDRA L. WHITE,

Petitioners,

v.

TEAMSTERS LOCAL UNION NO. 764, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO-CLC,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

CORRECTED PETITION FOR WRIT OF *CERTIORARI*

W. JAMES YOUNG*
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

October 2000

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QUESTIONS PRESENTED

I. Is a claim for relief pursued in a federal court lawsuit mooted when the defendants agree in an alternative forum to provide lesser relief than that sought by the plaintiffs in their chosen forum?

II. Is a claim for relief pursued in a federal court lawsuit mooted when the defendants reach a settlement with a non-party in alternative proceedings absent the participation and/or consent of the plaintiffs proceeding in their chosen forum?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Petitioners' employer, Philips Industries, Inc., d/b/a Philips Products, Inc., Selinsgrove, was a Defendant in the proceedings in the District Court, and an Appellee in the proceedings before the United States Court of Appeals for the Third Circuit. However, prior to the Third Circuit's disposition, the Petitioners settled their dispute with their employer, and it was dismissed from the case upon a stipulation granted on 2 November 1999.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

No. 00-____

ERIC BUCKLEY; DAVID W. MOWRY; DALE C. RATHFON, JR.; DAVID A. REICHENBACH; DENNIS L. REICHENBACH; JACOB WEAVER; DUANE L. WHITE; AND SANDRA L. WHITE,
Petitioners,

v.

TEAMSTERS LOCAL UNION NO. 764, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO-CLC,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioners Eric Buckley, David W. Mowry, Dale C. Rathfon, Jr., David A. Reichenbach, Dennis L. Reichenbach, Jacob Weaver, Duane L. White, and Sandra L. White respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on 10 March 2000.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A, *infra*, 1a) is unreported. The opinion and order of the United States District Court for the Middle District of Pennsylvania on Respondent's Motion to Dismiss, and its Final Judgment (App. B, *infra*, 4a) are unreported. The Court of Appeals' unreported order denying the Petition for Rehearing and Suggestion of Rehearing *En Banc* appears in App. C, *infra*, 17a.

JURISDICTION

The Court of Appeals entered its judgment on 10 March 2000. Petitioners' timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 25 April 2000 (App. C, *infra*, 17a). The time for petitioning for a writ of *certiorari* runs from the latter date. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). On 12 July 2000, pursuant to 28 U.S.C. § 2101(c) (West 1993) and Rule 13.5 of the Rules of this Court, Justice Souter extended the time within which to file a petition for a writ of *certiorari* to and including 22 September 2000. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III of the United States Constitution. This case also involves §§ 8(a)(3), and 9(a) of the

National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 158(a)(3), and 159(a) (West 1998), and § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (West 1998). Their pertinent text is set out in Appendices D, E, F, and G, *infra*, 19a-22a.

STATEMENT OF THE CASE

This case involves application of the mootness doctrine where defendants in a federal lawsuit seek and obtain resolution in another forum absent the consent and participation of plaintiffs, and agree to provide lesser relief than that sought by plaintiffs/employees in their appropriately filed and pursued federal court lawsuit asserting claims for violation of the statutory duty of fair representation ("DFR"), and for breach of contract under § 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185 (West 1998).

As pertinent to this Petition, this is a civil action for breach of the duty of fair representation under § 9(a) of the Act, 29 U.S.C. § 159(a) (West 1998), which is an Act of Congress regulating commerce. It is also an action for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce, as defined in 29 U.S.C. § 142(1) (1988). Petitioners Eric Buckley, *et al.* ("the nonmembers"), therefore, contend that the District Court had jurisdiction under 28 U.S.C. §§ 1331 & 1337(a), and § 301 of the LMRA, 29 U.S.C. § 185 (1988), and that their claim was not mooted by the independent and unilateral actions of Defendants, acting in conjunction with the National Labor Relations Board's General Counsel. However, after the District

Court held that the nonmembers' breach of contract claims and some of their claims of violation of the DFR are subject to the exclusive jurisdiction of the National Labor Relations Board ("Board" or "NLRB"), App. B at 11a, the United States Court of Appeals for the Third Circuit held that a unilateral settlement entered into by the Board's General Counsel and Defendants effectively mooted all of the nonmembers' claims for relief in this action, even though that scheme did not provide all of the monetary or equitable relief sought by the nonmembers in their Complaint.[1]

I. The Facts.

Petitioners are eight individuals employed by Philips Industries, Inc., d/b/a Philips Products, Inc., Selinsgrove ("Philips") at its manufacturing plant located in Selinsgrove, Pennsylvania. Each is an "employee" as defined in § 2(3) of the National Labor Relations Act ("NRLA"), 29 U.S.C. § 152(3) (West 1998). Record ("R.") 1: Complaint, ¶ 4.

Respondent Teamsters Local Union No. 764, International Brotherhood of Teamsters, AFL-CIO-CLC ("Local 764"), is a "labor organization" as defined in NLRA § 2(5), 29 U.S.C. § 152(5) (West 1998). Pursuant to NLRA § 9(a), 29 U.S.C. § 159(a) (West 1998), Local 764 is the "exclusive representative" of a bargaining unit of Philips' employees, including the nonmembers, and is and has been party to a series of collective

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[1] The District Court dismissed the nonmembers' remaining claims for violation of the DFR under Rule 12(b)(6), FED. R. CIV. P.

bargaining agreements ("CBA[s]") with Philips covering that bargaining unit. R. 1: Complaint, ¶ 5.

Philips is an "employer" under NLRA § 2(2), 29 U.S.C. § 152(2) (West 1998), and has recognized Local 764 as the exclusive bargaining representative of a unit of employees at its Selinsgrove location, which includes the nonmembers. R. 1: Complaint, ¶ 6.

The relevant Philips/Local 764 CBA was made and entered into on or after 10 September 1997, R. 1: Complaint, ¶ 8 & Exhibit A, and includes a provision, Article IV, titled "UNION SECURITY & CHECK-OFF," requiring that all Philips' employees become and/or remain "members of the Local Union in good standing as a condition of employment," upon pain of discharge from employment. R. 1: Complaint, ¶¶ 10 & Exhibit A, Art. IV.

Philips has enforced the CBA provision set forth *supra* by representing to all bargaining unit employees (including the nonmembers) that "membership in good standing" in Local 764 is and can lawfully be required as a condition of continued employment with Philips, unless "the Union chooses not to accept the employee's offer to rejoin." *Id.* at ¶ 11. Specifically, on or about 30 September 1997, Philips, by its agents and/or employee Jack L. Conner, Plant Manager, distributed to "All Philips Products Selinsgrove Employees" a memorandum representing that, *inter alia*, employees could resign from union membership to work during a strike and thereby avoid the risk of a union-imposed fine, but that:

> In the event an employee decides to resign his/her Union membership, and later the Company and Union

> agree to a union shop clause, the employee will either be allowed to rejoin the Union, or if the Union chooses not to accept the employees's offer to rejoin, then the employee will be allowed to work at Philips. just as if he/she were a member of the Union.

Id. at ¶ 12 & Exhibit B.

Local 764 actually enforced the forced-unionism provision set forth above by representing to all bargaining unit employees (including the nonmembers) that "membership in good standing" in Local 764 is and can lawfully be required as a condition of continued employment with Philips. *Id.* at ¶ 13. Specifically, between 22 October and 7 December 1997, after each nonmember conveyed his or her resignation from union membership, *id.* at ¶ 16, Local 764, by its agents and/or employee, John F. Aderhold, sent individual letters to each Plaintiff representing, in pertinent part, that:

> If you read the Sections under Article IV — Union Security and Checkoff, you will read that **union membership is required to work at Philips Products**.... Also, we have no agency shop language at Philips.
>
> I would not like to see you leave Philips because you don't want to **abide by contractual language**. Please understand the ramifications of anyone becoming a non-member; where allowed by law, you have no vote on proposed contracts or for union representatives, you personally cannot hold a union office or attend membership meetings, and you would lose

> benefits provided for you and any eligible dependents as provided by American Income Life.

Id. at ¶ 14 & Exhibit C (added emphasis). The letter sent to Sandra L. White and two other petitioners also contained a sentence at the end of the first paragraph, as follows: "Article IV, in your contract, was always in force and had never been changed or altered and remains in force for the term of the newly ratified contract." *Id.*

This action, seeking relief for the negotiation, maintenance, and enforcement of an illegal forced-unionism clause requiring -- and, the nonmembers expected the evidence to demonstrate, intended to require — full union membership, followed. *Id.* at Relief Requested.

II. Proceedings Below.

The nonmembers filed their Verified Complaint on 18 February 1998. R. 1. Local 764 filed its Answer on 27 March 1998, R. 2, and — after two stays — Philips filed its Answer on 15 July 1998. R. 8.

After another stay — occasioned by this Court's decision to review *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *aff'd*, 525 U.S. 33, 119 S. Ct. 292 (1998) — Local 764 and Philips filed separate Motions to Dismiss on 20 January 1999 and 22 January 1999, respectively. R. 18; R. 19. Local 764 based its motion solely upon Rule 12(b)(6), FED. R. CIV. P.; Philips' Motion was based upon Rule 12(b)(1) and (6), FED. R. CIV. P.

The District Court granted Defendants' Motions to Dismiss on 15 April 1999, App. B at 4a-14a, entering Judgment on the same day. App. B at 15a-16a. The Court dismissed the nonmembers' claim "that the union security clause is invalid, [as well as] the related claim concerning negotiation of the union security clause," App. B at 15a, pursuant to Rule 12(b)(6), FED. R. CIV. P., holding that the nonmembers' Complaint failed to state a claim upon which relief could be granted, "as barred by *Marquez*." App. B at 13a, *citing Marquez v. Screen Actors Guild*, 525 U.S. 33, 119 S. Ct. 292 (1998). Further, the District Court dismissed the nonmembers' "claim relating to the alleged attempts to enforce the union security clause. . . under FED. R. CIV. P. 12(b)(1)," App. B at 16a, holding that this alleged breach of the duty of fair representation "plainly falls within the definition of 'unfair labor practice' under § 7 and § 8" of the NLRA, 29 U.S.C. §§ 157 & 158 (West 1998).

The nonmembers timely filed a Notice of Appeal. R. 26.

Unlike the District Court, the Court of Appeals' panel appears to have conceded that the federal courts have jurisdiction over the nonmembers' claim for breach of the DFR and the CBA, but held that the nonmembers' claims were mooted by a settlement of unfair labor practice charges filed by Philips with the Board and against Local 764 in proceedings in which the nonmembers did not, and could not, participate. Those charges were filed only after the nonmembers' instant lawsuit was filed.

The panel noted that the nonmembers sought declaratory and injunctive relief against Local 764 for violation of its duty of fair representation to the nonmembers in its negotiation, maintenance, and enforcement of its "members only" clause against them, as well as "an order directing that the union

refund **all union dues paid by plaintiffs subsequent to their resignations from Local 764. . . .**" App. A at 2a (emphasis added). However, the panel went on to state that:

> the National Labor Relations Board, pursuant to a settlement agreement at Case 4-CB-8024, dated February 18, 1999 and March 4 & 5, 1999, ordered that Local 764 (1) may not threaten employees with loss of their employment for failing or refusing to remain union members, (2) may not refuse to accept resignations from the union, (3) may not represent that full union membership is a condition of employment at Philips Products, (4) must reduce fees from objecting nonmember employees, (5) **must reimburse with interest all the named plaintiffs for any losses they may have suffered as a result of the union's failure to promptly reduce fees by a percentage of attributable to non-chargeable expenses. . . .**

App. A at 2a (emphasis added). Based upon these facts, the panel concluded that "the relief sought in the district court has already been obtained by the NLRB order," and that this case should therefore be "dismissed as moot." *Id.* at 3a.[2]

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[2] The panel's language seems to confuse a reviewable "NLRB order" — over which the nonmembers could have petitioned for review, 29 U.S.C. § 160(f) (permitting "person[s] aggrieved" to seek review) — with an unreviewable settlement agreement between the NLRB's General Counsel, Local 764 (respondent to the charge), and Philips (which filed the charge). *See NLRB v. United Food & Commercial Workers Local 23*, 484 U.S. 112, 125-27 (1987) (General Counsel possesses unreviewable discretion as to disposition of unfair labor practice charges prior to hearing before adminis-

(continued...)

A timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 25 April 2000. App. D at 15a-16a.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision Conflicts with the Circuits' Well-Established Rule That a Case Is Not Mooted When the Court Can Grant Effectual Relief.

A. The Conflict.

Because Article III of the Constitution limits exercise of the "judicial Power" to "Cases" or "Controversies," *Clinton v. City of New York*, 524 U.S. 417, —, 118 S. Ct. 2091, 2099 (1998), the federal courts lack the authority to render opinions on moot controversies or upon abstract propositions, or to declare principles or rules which cannot affect the matter in issue in the case before it. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). A case is moot where the issues before the court no longer present a live controversy or where the parties lace a cognizable interest in the outcome of the suit. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *see also H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 612 (9th Cir. 2000) (same).

"[M[ootness can arise at any stage of litigation," *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (*per curiam*), *citing Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974), and appellate courts should dismiss an appeal "when, by virtue of an interven-

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[2] (...continued)
tration law judge). The nonmembers were not parties to those charges in any manner whatsoever.

ing event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Id.*; *see also Honig v. Students of California School for the Blind*, 471 U.S. 148, 149 (1985) (claim seeking to compel school to conduct seismic tests rendered moot when tests were conducted); *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999) ("case becomes moot only when it is 'impossible for the court to grant *any* effectual relief whatever to a prevailing party'") (original emphasis); *Davis v. United States Dep't of Justice*, 204 F.3d 723, 727 (7th Cir. 2000) (*per curiam*) (same).

Thus, in *Calderon*, this Court reversed the lower courts' findings of mootness, noting that "even the availability of a 'partial remedy' necessary to avoid mootness will be available" to the petitioner. *Id.* at 150; *see also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 n.5 (1980). Furthermore, this Court has described as "well settled" the principle that "'voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth v. Laidlaw Environmental Servs.*, 528 U.S. —, —, 120 S. Ct. 693, 708 (2000), *quoting City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982); *see also Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 305 & n.14 (1986), and cases cited therein.

It logically follows from *Calderon* and *Friends of the Earth* that a defendant's unilateral provision of partial relief cannot moot a case in which a plaintiff seeks (or plaintiffs seek) greater relief than that already accorded. 13A CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE & PROCEDURE § 3533.2, 243-44 & fn.31 (2d ed. 1984). Yet, surprisingly, the decision below creates a deep conflict among the United States Courts of

Appeals over whether partial relief can suffice to moot a case, as well as conflict within the Third Circuit itself.

In addition to the Third Circuit in this case, not less than six other courts of appeals have faced this issue. None has taken the position adopted by the Third Circuit in its unreported decision here, *i.e.*, that the provision or occurrence of partial relief can moot plaintiffs' claim for relief not provided or obtained.[3] Indeed, even the Third Circuit rejected the proposition informing its decision here on at least two prior occasions, holding that two conditions must first be satisfied before a case will be held to be moot:

> [A] case becomes moot if (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will reoccur, and (2) interim relief or events have **completely** and **irrevocably** eradicated the effects of the alleged violation.

In re Japanese Electronic Products Antitrust Lit., 723 F.2d 238, 318 (3d Cir. 1983) (emphasis added), *rev'd in part*, 475 U.S. 574 (1986), *on remand*, 807 F.3d 44 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987), *quoting Phillips v. Pennsylvania*

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[3] That the Third Circuit's decision is unpublished makes it no less pernicious in setting the Circuit in defiance of otherwise unanimous contrary decision-making. In a recent scholarly decision, *Anastasoff v. United States*, No. 99-3917EM, 69 U.S.L.W. 1118, 1118-19 (8th Cir. Aug. 22, 2000), the Eighth Circuit rejected the proposition that unpublished decisions are not binding in the circuits in which they are decided (*see, e.g.*, LAR 28.3(b), 3d Cir. (binding authority identified as, *inter alia*, "published decisions of this Court")).

Higher Education Assistance Agency, 657 F.2d 554, 569 (3d Cir. 1981).

Not surprisingly, virtually every other circuit addressing this issue has disagreed with the principle informing the Third Circuit's decision in this case, holding either that "the **possibility** of even a partial remedy is sufficient to prevent a case from being moot," *Parella v. Rhode Island Employees' Retirement System*, 173 F.3d 46, 57 (1st Cir. 1999) (emphasis added), *citing Calderon*, 518 U.S. at 149,[4] or that only "settlement that resolves **all** disputes moots a lawsuit." *United States v. International Brotherhood of Teamsters*, 172 F.2d 217, 221 (2d Cir. 1999) (emphasis added); *see also Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 638 F.2d 7, 8 (2d Cir. 1980); *In re Boodrow*, 126 F.3d 43, 46 (2d Cir. 1997).

The Eighth Circuit's treatment of this issue in the wake of this Court's decision in *Calderon* is illustrative of the general

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[4] *See also Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) (mootness requires intervening event divesting plaintiff of "all personal interest in the result" or complete eradication of its effects and that it will not recur again); *cf. Porter v. Schweiker*, 648 F.2d 310, 311-12 (5th Cir. 1981) (offer of settlement not providing all relief that plaintiff might win from court was not effective to moot case); *Lindstrom v. Graber*, 203 F.3d 470, 474 (7th Cir. 2000) (appeal mooted when action sought to be prevented occurred); *Sesler v. Pitzer*, 110 F.3d 569, 571 (8th Cir. 1997) (case not moot when, if appeal successful, litigant would obtain positive benefit); *Children's Hospital & Health Center v. Belshe*, 188 F.3d 1090, 1095 (9th Cir. 1999) (case not moot because effective relief can be granted); *Byrd v. United States EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (injury not mooted by tardy compliance and cessation of on-going violation); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1353 (D.C. Cir. 1998) (availability of partial remedy prevents mootness), *citing Calderon*, 518 U.S. at 150.

rule. In *Sesler v. Pitzer*, 110 F.3d 569, 571 (8th Cir. 1997), it rejected the suggestion that a *habeas corpus* petition was mooted by the prisoner's parole from prison, since he remained "in the 'custody' of the State" in supervised release. 110 F.3d at 571. Thus, if successful in his appeal, Sesler would have been entitled to a reduction in his term of supervised release, rendering his appeal a live and continuing controversy sufficient to avoid mootness.

Sesler concluded that "if successful here . . ., Sesler will be entitled to a one-year reduction of his term of supervised release." *Id.* *Sesler* thus held, directly contrary to the Third Circuit in this case, that the availability of additional relief precludes a finding of mootness. *Id.*

Likewise, the Fifth Circuit in *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998), applied this Court's decision in *Calderon*, 518 U.S. at 149-51, making it equally clear that a finding of mootness must be predicated upon "an intervening factual event which causes the plaintiff no longer to have a present right to be vindicated or a stake or interest in the outcome." *Dailey*, 141 F.3d at 227; *see also* 15 JAMES WM. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE, § 101.92 at 101-169 (3d ed. 1997); 13A FEDERAL PRACTICE & PROCEDURE § 3533.2 at 231-61 (2d ed. 1984). The Fifth Circuit specifically noted, however, that the "intervening event . . . will only render a plaintiff's action moot if the plaintiff is divested of **all** personal interest in the result or the effect of the alleged violation is **completely eradicated** and the event will not occur again." 141 F.3d at 227 (emphasis added).

Perhaps most analogous, however, is the Seventh Circuit's decision in *Loss v. Blankenship*, 673 F.2d 942 (7th Cir. 1982).

In that case, the court rejected the notion that a Board final order granting some, but not all, of the relief sought in the case mooted the employees' action for interference with a contract. *Id.* at 951 n.11. In *Loss*, though, a stronger case might have been made for mootness, as the plaintiffs were members of a local union, and were certified as representatives of a class of all of the union's members, and the unfair labor practice charges filed against the employer were filed by the local union. Nevertheless, because full relief was not obtained before the Board even where the parties to the lawsuit or their privies participated in the proceedings, that settlement failed to moot the individuals' claims for relief.

Here, of course, the factual allegations of the nonmembers' Complaint dismissed by the District Court were that Respondent Local 764 and Philips entered into a facially invalid compulsory unionism clause. R. 1, ¶¶ 18-19; App. B at 10a-11a, *citing Marquez*, 525 U.S. 33, 119 S. Ct. 292 (1998). However, the nonmembers' Complaint **also** challenges Respondent's and Philips' specific efforts to force employees to become and remain formal union members as a condition of continued employment with Philips. R. 1, ¶¶ 19-20. Thus, as relief, the nonmembers requested that the District Court:

> A. enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, which declares that Local 764 has violated its duty of fair representation under § 9(a) of the NLRA by negotiating, maintaining, and enforcing in any manner the "Union Security & Check-Off" clause in its CBA with Philips;
>
> B. enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, which declares that the "Union Secu-

> rity & Check-Off" clause in the Local 764/Philips CBA is facially invalid and void under the National Labor Relations Act, as authoritatively construed by the Supreme Court in *Communications Workers of America v. Beck*, [487 U.S. 735 (1988)];
>
> C. order Defendants to expunge their facially invalid "Union Security & Check-Off" clause from the CBA, . . . ;
>
> D. enter a permanent injunction which prohibits Defendants in the future from negotiating, maintaining, or enforcing in any manner a clause in any collective bargaining agreement between them which purports to require that bargaining unit employees become and/or remain members of the unions as a condition of continued employment;
>
> E. order Defendants to refund all amounts collected from Plaintiffs as union dues subsequent to their resignations from union membership; and
>
> F. such other and further relief as this Court may deem just and proper.

Id. at 8-9 (Relief Requested) (citations omitted). This element of the nonmembers' claim is clearly **not** foreclosed by this Court's "narrow decision" in *Marquez*, 525 U.S. at —, 119 S. Ct. at 299, as this Court assumed *arguendo* "exemplary" enforcement efforts and addressed only the nonmembers' challenge to the facial validity of the forced-unionism clause. *Id.* Furthermore, Justice Kennedy's concurrence (joined by Justice Thomas), makes clear that the principle opinion: "does not address circumstances in which there is evidence that a

security clause such as this one was used or intended to deceive or injure employees," as alleged here, and that such evidence "[i]f further developed ... would likely be relevant to the [DFR] claim that remains for trial." *Id.* at —, 119 S. Ct. at 303 (Kennedy, J., concurring).

Furthermore, while disposition of a legal issue in another forum can moot a case under application of principles of *res judicata* and collateral estoppel, there is no authority for the proposition seemingly adopted by the Third Circuit here, *i.e.*, that defendants to a lawsuit may unilaterally present the legal issue in another forum without the participation of the claimants, settle the dispute (also without the participation of the claimants), and impose the terms of that settlement as final and binding upon the claimants. App. A at 2a-3a. Indeed, the **only** authority cited by the panel below, *Wegscheid v. Local 2911*, 117 F.3d 986, 989 (7th Cir. 1997), App. A at 3a n.1, is inapposite. *Wegscheid* addressed a settlement into which the complaining nonmembers **had** entered, to the detriment of their DFR suit in federal court. 117 F.3d at 989-90 (partial settlement entered into by plaintiffs completely mooted their claim).

Here, of course, the "settlement" upon which the panel below relied was one to which the nonmembers were **not** parties, and to which only Respondent Local 764, Philips, and the Board's General Counsel were parties. Indeed, there is no indication in the record that — notwithstanding the pendency of this lawsuit — any of the parties to the settlement, including the Board's General Counsel, ever bothered to concern themselves with the nonmembers' views of the

adequacy of their unilateral "settlement" of Philips' unfair labor practice charges against Local 764.[5]

B. The Importance of the Issue.

This question manifestly is important, both in principle and in practice, as this Court previously recognized by granting *certiorari* in cases such as *Beck* and *Marquez*.

It is important in principle because the enforcement of a forced-unionism provision beyond the limits set in § 8(a)(3), 29 U.S.C. § 158(a)(3) (West 1998), impairs an employee right explicitly guaranteed in § 7 of the Act, 29 U.S.C. § 157 (West 1998), and a fundamental congressional policy imbedded in the Act. The employee's right impaired is the "right to refrain from" union membership "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)]." 29 U.S.C. § 157 (West 1998). The fundamental congressional policy impaired is that of protecting employees' "full freedom of association," 29 U.S.C. § 151

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[5] It is for this reason that any suggestion that application of principles of *res judicata* support the panel's decision must also fail. As the Ninth Circuit recently observed, "In order to bar a later suit under the doctrine of *res judicata*, an adjudication must (1) involve the same 'claim' as the later suit; (2) have reached a final judgment on the merits; and (3) involve the same parties or their privies." *Diloreto v. Downey Unified School District Board of Education*, 196 F.3d 958, 964 (9th Cir. 1999), *quoting Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993). The Local 764/Philips/General Counsel settlement here fails to satisfy any of these requirements.

(West 1998), and "the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b) (1988). More particularly, the policy impaired is "the congressional policy of voluntary unionism" that is "implicit in § 8(a)(3)." *Pattern Makers League v. NLRB*, 473 U.S. 95, 104-05 (1985).

Whether a union and employer may resolve the DFR claims of individual employees who have availed themselves of their right to file a federal court complaint by filing unfair labor practice charges with the NLRB and settling with its General Counsel is important in practice for two reasons.

Specifically in the context of DFR cases, the decision below does violence to the protections for employees subject to monopoly representation that this Court has unremittingly embraced since its earliest DFR cases, *see, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Vaca v. Sipes*, 386 U.S. 171 (1967), continuing through its decision in *Beck*, 487 U.S. 735 (1988). Under the DFR standard, a union possesses "A wide range of reasonableness . . . in serving the unit it represents, subject always to **complete good faith and honesty of purpose in the exercise of its discretion.**" *Id.* (emphasis added). That duty is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 74 (1991). Under the DFR, "the union is obliged 'fairly and equitably to represent all employees . . . union and nonunion,' within the relevant unit." *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977), *quoting Machinists v. Street*, 367 U.S. 740, 761 (1961) (omission in original). A union breaches its DFR when its conduct is "arbitrary, discriminatory, or in bad faith." *O'Neill*, 499 U.S. at 67; *see also Vaca*, 386 U.S. at 190.

Union efforts illegally to enforce a forced-unionism provision clearly violate the DFR. *Beck*, 487 U.S. at 742-44. *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1377 (D.C. Cir. 1995), identified the necessary criterion for determining whether a union breaches its fiduciary duty in enforcing such a provision: "A union's fair representation duty in the context of a mandatory agency fee hinges on its compliance with section 8(a)(3) of the NLRA." This holding follows logically from the fact that, in negotiating and enforcing a compulsory unionism agreement, a union acts in its own interest and against the interests of employees who are not voluntary members. Thus, if an exclusive representative enforces its forced-unionism agreement by requiring more of employees than permitted by § 8(a)(3) — by definition a violation of the Act — it is axiomatic that it acts arbitrarily, *i.e.*, in violation of the DFR. "Viewed in light of the legal landscape," such conduct "can be fairly characterized so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78-79, *quoting Huffman*, 345 U.S. at 338 (citation omitted).

The Third Circuit's decision below disregards the principle that individuals possess the right to bring their federal claims to the federal courts. It substitutes a defendant's choice of forum (here, the employer's) for that of the individuals whose rights have been violated and who have chosen legitimately to bring their claims to a federal court forum.[6] It substitutes for the

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[6] That an employer would seek resolution before the Board is hardly surprising. Notwithstanding that the Act, 29 U.S.C. § 158(a)(1), bars employer interference, restraint, and coercion in the employees' exercise of

(continued...)

remedies sought by those individuals remedies deemed adequate by the Board's General Counsel and the defendants, without so much as consultation with the individuals whose rights have been violated.

More generally, the decision below does violence to fundamental principles of due process. The record clearly illustrates that the nonmembers here — having chosen their federal court forum — did not participate in the Board proceedings. The "settlement" upon which the panel relied resolved an unfair labor practice charge filed solely by Philips against Local

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[6] (...continued)
all of their rights under § 7 of the Act, 29 U.S.C. § 157 (including both the right to participate in **and** to refrain from union activity), the Board limits its attention to employer activity motivated by **anti**-union *animus*. *See, e.g.*, *Ryder Truck Rental, Inc.*, 318 N.L.R.B. 1092, 1096 (1995) (employer unlawfully attempted to have transfers from union to non-union facility sign "yellow-dog contracts"); *Jerome Russo Quality Painting & Decorating, Inc.*, 309 N.L.R.B. 973, 981 (1992) (same); *M & M Electric Co.*, 323 N.L.R.B. 361, 361 (1997) (finding illegal layoff occurring because of employee's union activity); *Nathan Katz Realty Co.*, 317 N.L.R.B. 73, 78 (1995) (employer unlawfully told employees not to contact any union); *Fun Connection & Juice Time*, 302 N.L.R.B. 740, 741 (1991) (employer violation in conditioning strikers' rehire upon union disavowal and withdrawal); *Mini-Togs, Inc.*, 304 N.L.R.B. 644, 644 (1991) (violation found in employer distribution of union withdrawal cards). Indeed, the Board has recently held, in a context similar to the nonmembers' case here, that an employer's **pro**-union activities in coercing employees into formal union membership are perfectly acceptable. *Rochester Mfg. Co.*, 323 N.L.R.B. 260, 261-62 (1997), *pet. for review denied sub nom. Cecil v. NLRB*, 194 F.3d 1311 (6th Cir. 1999), *cert. denied*, — U.S. —, 120 S. Ct. 1671 (2000). The nonmembers' Complaint, on the other hand, seeks relief against both the union and the employer.

764. The "agreement" cited by the panel below was between Philips, Local 764, and the Board's General Counsel. The record does not even indicate that any of the nonmembers were **witnesses**, let alone parties, to the proceedings or the agreement which Philips, Local 764, and the General Counsel reached. It is, therefore, unsurprising that the "remedy" to which they agreed was a pale shadow of the relief sought by the nonmembers, which included a refund of all union dues collected under the forced-unionism agreement, not the mere pittance that Local 764 was willing to provide, and whose calculation of nonchargeable expenditures Philips and the General Counsel were willing — without question or independent review — to accept.

This Court's intervention is therefore necessary to establish conclusively nationwide that defendants cannot evade the judicial process by taking the argument to another forum friendlier to their interests, and that the courts cannot evade their responsibilities under Article III to decide "Cases" or "Controversies" by ignoring the differences between the remedies sought in federal court and by those acceptable to and obtained by defendants in their alternative forum.

II. The Third Circuit's Decision Conflicts with the Otherwise Well-Established Rule That a Settlement Involving Less Than All Parties Does Not Moot a Case.

A. The Conflict.

In addition to violating the principle that an intervening event providing less than full relief does not moot a case, *Calderon*, 518 U.S. at 149-51, the Third Circuit's decision rests upon the heretofore uniformly-rejected principle that a settle-

ment involving less than all of the litigants can moot a case. This conflicts with the decisions of at least three other courts of appeals.

While discussion of the participants in the "settlement" upon which the Third Circuit relies is scrupulously avoided in the panel's decision, the record is clear that the nonmembers were not parties to the agreement (first submitted as an exhibit to Appellee Local 764's Brief to the panel below, Exhibit A). The only parties to it were the Board's General Counsel and Philips (as charging party), and Local 764. At least three other courts of appeals have specifically rejected the notion that a settlement involving less than **all** of the parties to litigation can moot that litigation.

In *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 844-45 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994), the plaintiffs and the Texas Attorney General attempted to settle a challenge to the county-wide election of state district judges, and to dismiss the appeal. Holding that the Attorney General could not bind other defendants, the Fifth Circuit held that the claims of two intervening district judges were therefore not mooted by that attempt at settlement.

Likewise, in *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135, 138-39 (6th Cir. 1986), the Sixth Circuit addressed a dispute in which the State of Ohio, as an intervenor defendant, sought to appeal from an order declaring a state statute governing mergers and acquisitions to be invalid, and enjoining its enforcement. When the original parties resolved their dispute on appeal, and sought to withdraw their appeals, the State took the position that it intended to enforce the statute unless enjoined, and the Sixth Circuit held that the cause was not

mooted by the settlement of less than all of the parties to the litigation.

Similarly, the Tenth Circuit has twice rejected the proposition that a settlement by less than all of the parties to a litigation can moot a case or controversy. *Johnson v. Board of County Commissioners, County of Fremont*, 85 F.3d 489, 492-93 (10th Cir. 1996), *cert. denied*, 519 U.S. 1042 (1997); *Federal Deposit Insurance Corporation v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987).

Noting that permitting a settlement entered into by some parties to moot a case "might well provide incentives for settlement that would run contrary to the interests of justice," the Tenth Circuit in *Jennings* held that an appeal from the denial of intervention of right under Rule 24(a)(2), FED. R. CIV. P., could be maintained notwithstanding the original litigants' settlement of the underlying action. 816 F.2d at 1490-91, *citing Tosco Corp. v. Hodel*, 804 F.2d 590, 592 (10th Cir. 1986) (noting that, "[w]ith some exceptions, a settlement involving **all** parties and **all** claims moots an action") (emphasis added).

In *Johnson*, perhaps the most liberal application of the principle that settlements among only some litigants do not moot the claims of nonparties to the settlement, the Tenth Circuit held that settlement of the merits of a dispute did not moot an attorney's appeal of an order disqualifying her from further representation, "insofar as that order rests on grounds that could harm his or her professional reputation." 85 F.3d at 492 (footnote omitted). Because the lower court's order had found that the attorney had violated the Rules of Professional

Conduct, her appeal from that order was not precluded by settlement of the underlying action.

B. The Importance of the Issue.

This issue is likewise important because it addresses fundamental due process. It was the Tenth Circuit that perhaps most cogently noted the reason why courts **cannot** permit cases to be mooted by settlements entered into by less than all of the parties to the litigation, insofar as such a rule "might well provide incentives for settlement that would run contrary to the interests of justice." *Jennings*, 816 F.2d at 1490-91. As a result, the litigant subject to the unilateral actions of other litigants — here, their litigation opponents — are denied the "notice and a meaningful opportunity to be heard" which are the *sine qua non* of due process under the Constitution. *LaChance v. Erickson*, 522 U.S. 262, ___, 118 S. Ct. 753, 756 (1985); *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). Consequently, their rights — to due process and to access to the federal courts — are violated for a second time by their litigation opponents.

The Third Circuit's decision below constitutes a fundamental denial of due process, permitting Philips and Local 764 not only to substitute their choice of forum for that of the nonmembers, but to obtain a "settlement" — treated as binding by the panel — absent any participation by the nonmembers whatsoever.

This Court's intervention is therefore necessary to establish conclusively nationwide that defendants cannot evade being called to account in the federal courts by presenting the argu-

ment to another, friendlier forum, and obtaining a favorable "settlement," absent any participation whatsoever by the litigation opponents whose rights are affected by the outcome of that substitute forum.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

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